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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 ANDRE JONES, et al.,

9 Plaintiff(s),

10 v.

11 RABANCO, Ltd., et al.,

12 Defendant(s).

13 No. C03-3195P

14
15 ORDER ON THE SPECIAL
16 MASTER'S REPORT REGARDING
17 FARAGHER-ELLERTH
18 DISCOVERY

19
20 This matter comes before the Court following the Special Master's review of Defendant's
21 Privilege Log. The Report of the Special Master in this matter and the Special Master's annotated
22 Index of Documents are filed at Docket Numbers 260 and 261. In some places, the Special Master's
23 Report calls for production of a document after certain information is redacted. The documents
24 requiring redaction before they are produced are marked with an asterisk in this Order. Where this
25 Order calls for a redaction of a document, Defendant shall file the redaction on CM-ECF with the
26 Court and under seal. The code used to replace the redacted information shall also be filed
 electronically with this Court and placed under seal. For the time being, the Court will retain the
 documentation submitted to the Special Master for the purposes of making an *in camera* comparison
 of the redacted documents and the unredacted documents, to assure that the redaction is fair.

1
2 The Court, having reviewed the documents in the Defendant's Privilege Log, having read the
3 Special Master's Report, and being otherwise fully advised, does now Order the Defendant to
4 produce to Plaintiff the following documents pursuant to the Report of the Special Master:

1
2 Volume I 00079-90
3 00024-0026
4 01475
5 00028-29
6 00116-00121
7 00129
8 00107-08; 00112-114
9 00170-175
10 00147-8
11 00054-55
12 01638-40
13 ;
14 Volume II 00301
15 ; 000200-215
16 , 00647
17 , 00429
18 } 00514
19) 00648: all except redact e-mail dated 6/19/03, 7:01
20) 00430-00431: all except redact as above
21) 00645-00646: all except redact as above
22 | 00435
23 , 01380-01384: all except redact 00644
24 } 00943
25 | 00941
26 , 00473-00474
27 ~ 00475-00476 & 01513-01514

1
2 00248
3 01509
4 01510
5 00477-00478
6 00258
7 00254-00255
8 00217 and 00247
9 00441-00443 and duplicates
10 01368-01379
11 00190-00198
12 00259-00261
13 00453-00454 and duplicates
14 00249-00251* and duplicates with a code number substituted for the names of
15 non-plaintiffs and non-NAACP complainants. These codes to be the same on all documents following
16 where the same names appear.
17 00448-00449* and duplicate, and produced as above
18 00665-00668* produced as above
19 00366* produced as above
20 01508* produced as above
21 00450-00452* produced as above
22 01534-01536
23 00669
24 00455-00457
25 00670-00672 and duplicate
26 00461-00462
27 00528-00529

1
2 00300
3 00407
4 00265-00267
5 00389-00399* with names coded as above
6 00336-00350* with names coded as above
7 00408-00415* " "
8 00358-00365* " "
9 00308-00323* " "
10 00521-00527* " "
11 00673-00687* " "
12 00927-00938* " "
13 00530-00543* " "
14 00688-00702* " "
15 00703-00719* " "
16 00268-00273* " "
17 00372-00388* " "
18 00356-00357* " "
19 00302-00306* " "
20 00367-00371* " "
21 00351-00352* " "
22 00353-00355* " "
23 00400-00406* " "
24
25 Volume III 00571-00579 and duplicate
26 00725-00733 and duplicate
27 00734-00738

1
2 00765-00773 and duplicate
3 00774-00782 and duplicate
4 01258-01263
5 01248-01257
6 01237-01247
7 01225-01235
8 01212-01224
9 01130-01140
10 01119-01129
11 00739-00746
12 01433-01434
13 00274-00277
14 01167 e-mails dated 10/14/03 at 7:48 & 8:37 a.m. only
15 01425-01429
16 01442-01451
17 01499-01507
18 01463-01465
19 01612-01617
20 01466-01467
21
22 Volume IV 00218-00233 with entries that post-date 10/24/03 redacted; if the entry was
23 started prior to 10/24/03, the entire entry must be produced.
24 00245-00246 unless Rabanco produces a signed affidavit within ten days of
25 this Order by the creator of the document that it was prepared after October 24, 2003.
26 Settlement Documents:

1
2 The Court disagrees with the Special Master's recommendation that documents pertaining to
3 settlement discussions or offers should be disclosed under the Faragher-Ellerth doctrine. Judge
4 Learned's interpretation of the settlement documents in this case as remedial measures that should be
5 disclosed due to Rabanco's assertion of an affirmative defense is a reasonable one, if one reads this
6 Court's February 15, 2005 Order very broadly. However, upon a close reading of Faragher v. City of
7 Boca Raton and Burlington Industries, Inc.v. Ellerth, one sees that the Supreme Court's motivation
8 to create the affirmative defense for employers facing vicarious liability under Title VII for the actions
9 of their supervisors was fueled by a policy that favored giving an employers an incentive to prevent
10 and respond quickly to allegations of harassment. 524 U.S. 775, 806 (1998); 524 U.S. 742 (1998). In
11 its discussion of this defense in Faragher v. City of Boca Raton, the Court emphasized that this
12 defense bolstered the already-established EEOC policy of giving employers an incentive to prevent
13 sexual harassment. 524 U.S. 775, 806 (1998). The Court noted that the primary purpose of Title VII
14 is not to provide redress, but to avoid harm. Id. The Court also observed that the employee's
15 concomitant duty to "avoid or mitigate harm" is reflected in the second prong of this defense. Id. In
16 Faragher, the Court expressed concern over the financial repercussions that harassing supervisor
17 behavior could have for ordinary employees, should they be fired or choose to leave their jobs rather
18 than put up with the harassment. Id. at 804. The Court set up the affirmative defense to encourage
19 employers and employees to act BEFORE the damage was so serious that the employment
20 relationship was broken and the parties were in litigation or pursuing settlement. The logical result of
21 this reading of the cases and accompanying literature is that the draft settlement agreements are
22 undiscoverable because they are beyond the scope of the investigatory and remedial actions that the
23 Supreme Court incentivized for employers by allowing them to be used as an affirmative defense to
24 allegations of supervisor harassment. For this reason, the Court will allow the documents pertaining
25 to settlement plans and draft settlement offers to remain privileged. The settlement documents that
26 shall remain protected are numbered as follows:

1
2 00307
3 00544-00545
4 00546-00547
5 00720-00724
6 00613-00617
7 00548-00549
8 00600-00601
9 00602-00605
10 01298-01301
11 01264-01269
12 01394-01403
13 01392-01393
14 01302
15 01305-01309
16 01310-01315
17 01202-01204 e-mail of 9/24/03, 12:48 only
18 01322-01327
19 0921-00926
20 01317-01321
21 01329-01333
22 01205

23 Attorney Fees:

24 The Court finds that there was not a good faith basis for non-disclosure of many of
25 the above documents, after the court's order of February 15, 2005, except for those
26 involving proposed settlements. The documents ordered to be disclosed are
27 approximately one third of the whole. Therefore, Rabanco shall pay 67% of the

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2 Special Master's fees, and plaintiffs 33%. Payment is due and owing upon the
3 receipt of the Special Master's bill. All documents shall be produced to Plaintiff
4 within ten days of this Order.

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6 The Clerk of the Court shall direct a copy of this order be sent to all
7 counsel of record.

8 Dated this 15th day of August, 2005

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12 Marsha J. Pechman

13 United States District Judge